IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

ARNOLD et al.,	)
----------Plaintiffs,	)
vs.	) Case No. 23-CV-528-JLH-CJB
X Corp., et al.,	)
----------Defendants.	)

TRANSCRIPT OF MOTION TO QUASH

MOTION TO QUASH had before the Honorable Christopher J. Burke, U.S.M.J., on the 16th of October, 2023.

APPEARANCES

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-and-

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THE COURT: Let me say a few things for the record, and the first is that we're here today in the matter of *Arnold versus X Corp., et al.* It's Civil Action Number 23-528-CFC-CJB here in our court, and we're here for argument on Defendants' motion to quash certain subpoenas that were served by Plaintiffs. The Court has already addressed another issue, which was Defendants' request for a stay, and an oral order issued today, but we'll hear argument today on the motion to quash issues.

Before we go further, let me have counsel on the line for each side identify themselves for the record. We'll start first with counsel on the plaintiffs' side. We'll begin there with Delaware counsel, and I'll also ask Delaware counsel to let me know which of the counsel on its side will be addressing the motion.

MR. CHRISTENSEN: Good morning, Your Honor. Joe Christensen from Christensen & Dougherty on behalf of the plaintiffs. I'm joined by my co-counsel at Kamerman, Uncyk, Soniker & Klein, Akiva Cohen, who will be making the argument this morning, Your Honor.

THE COURT: Okay. Thank you and welcome.

And we'll do the same for counsel on Defendants' side. Again, we'll begin with Delaware counsel, and I'll ask counsel to let me know who will be arguing for your side.

MR. BARILLARE: Good morning, Your Honor. Jody Barillare from Morgan Lewis on behalf of the defendants. With me today are my colleagues Eric Meckley and Brian Loughnane, and with Your Honor's permission, Mr. Meckley will be delivering the argument for the defendants.

THE COURT: Great all right. So then I should turn to Mr. Meckley first, as it's Defendants' motion.

And, Mr. Meckley, I guess I just -- let me jump in with a couple of questions in that regard and then I'm, certainly, of course, happy to let you address anything you think we didn't cover in those questions as well.

And I guess the first question that I have kind of relates a bit to timing issues. Obviously, our court is busy. We have to try to do things in an efficient manner as it relates to all that's before us, and one of the -- it seems like a key issue that's at play with regard to the applicability of the crime fraud exception is that the Court would have to figure out whether a sufficient prima facie case has been laid out that the defendants intended to engage in fraud via their acts relating to the severance provision and that they likely would have communicated about that.

And it seems to me that that issue and the decisions the Court has to make kind of line up pretty squarely with at least one of the questions that would Court

would have to resolve on the pending motion to dismiss for lack of failure to state a claim and that is, did Plaintiffs plausibly allege a fraud claim? Do you think that's right, that a lot of the analysis or the type of analysis you'd be looking at as to the one issue would be pretty similar -- not exactly the same but pretty similar -- to the analysis you'd be looking at as to the other?

MR. MECKLEY: Your Honor, I don't think it's the same, and the reason I don't think it's the same is because the standards for the Rule 12(b)(6) motion under Twombley and Iqbal are going to be have you pled factual allegations that would plausibly state the claim whereas with respect to the burden of proving the crime fraud exception would apply that would entitle you to this discovery is a higher standard. And I think it, necessarily, has to be a higher standard for a variety of reasons, the first of which is the attorney-client privilege and work product doctrine is something that is pretty significant in the law, and there's a lot of very good reasons why it exists. And if the mere pleading of allegations in the complaint were sufficient enough to entitle you to discovery that invaded and intruded upon the attorney-client privilege, you're basically putting the cart before the horse, letting the tail wag the dog. It is not the same standard.

One is have you stated a potential claim. The

other relates to, presumably, evidence that you would seek to try to prove the merits of that claim, which is a different standard.

THE COURT: So I think your response is, well, the standards will differ. The 12(b)(6) standard is, has a plausible claim been asserted, and Plaintiff would be suggesting they have made certain allegations about why they think that fraud had occurred and those need to only be plausible, whereas we know that in the crime fraud exception world, what I'd be assessing is, is there a prima facie case that has been made and what is that burden.

Well, on the one hand it's said to not be a particularly heavy one and doesn't require preponderance of the evidence. But on the other hand, it's not nothing, and it requires some evidence, whatever that means. We'll get to that.

So I mean, both worlds are, you know, standards that are less than a preponderance of the evidence. Plaintiff relying, probably in both cases, on similar type of facts, a lot of which seemed like it had to do with what's in the merger agreement or maybe some additional communications. I get that the standards aren't exact, they're different, and, of course, you have to be mindful of the difference, and you have to rule based on differences.

But in both cases, it's a Court assessment of

has enough been pled, pointed to with regard to this fraud issue. And I guess if the Court would be making very similar types of analyses and decisions, I guess I'm not sure why it is that I'd be rushing to make that decision in the prima facie case context now as it relates to the subpoenas as opposed to when I get to the motion dismiss, I'm going to assess that fraud issue anyway in the context of plausibility. Once I assess it, I'll have had the chance to look through the arguments in great detail on a motion to dismiss, and if I turn to this prima facie case issue, the analysis should be straightforward from there, albeit under a different standard.

I'm wondering why I wouldn't take it in that order as a way to be efficient as a Court knowing all that we have before us in this district.

MR. MECKLEY: And, Your Honor, I appreciate that.

And the reason I would suggest that we not go that route is because, one, as I've already mentioned, the standards are different, and, two, with the complaint, it's allegations. With respect to the crime fraud exception, the plaintiff's burden there, certainly not a preponderance of the evidence, but evidence, more than allegations. And the fact that Your Honor's earlier ruling today denying the request for the stay of discovery, also, I think, plays into

this because now, presumably, Plaintiffs will have the ability to conduct discovery to try to get evidence that doesn't involve communications with attorneys which are privileged and have the opportunity to take depositions, serve requests for production, interrogatories, et cetera that presumably if there is any such evidence that might, then, support trying to breach the attorney-client privilege, then you'd have some evidence and it might not even be necessary.

So I think they're completely different standards, and your ruling on the motion to dismiss simply says whether a plausible claim has been stated. It wouldn't necessarily translate to a finding that a prima facie case of the crime fraud exception has been met, and I think there should be an opportunity to --

THE COURT: Can I just jump in those because I understood you to fault Plaintiffs' showing as to the prima facie case standard to be something like one of the reasons why we think that their showing is insufficient is that they have, essentially, only relied on the types of arguments they are making as to the allegations in their complaint. They have pointed to certain aspects of certain contracts and certain statements that are made, just as they're doing in their complaint. In the allegations they make there, they haven't mustered any additional evidence, documents,

affidavits bolstering facts that demonstrate that a fraud was afoot. Essentially, the evidence is similar across both and is wanting as to both. I thought that was the gist of your argument. Am I wrong?

MR. MECKLEY: No, you're correct that the evidence is wanting in both but with respect to different items. So the evidence in the complaint would be allegations, substantive factual allegations. The evidence with respect to the crime fraud exception would be evidence, actual documents, testimony, interrogatory responses, et cetera.

THE COURT: I'm sorry to jump in. I understand your argument, but let me ask it this way: I don't think from your view when it comes to the allegations that the plaintiffs have made in their complaint about the asserted fraud, we look at that, and then we look at the allegations the plaintiff has made in response to this issue, the crime fraud exception issue, I understand your position to be there's no real difference between the things that the plaintiffs are pointing to as to either of those contexts, and that's the problem. We, the defendants, believe that there needs to be evidence cited in the crime fraud context, and they don't have any extra evidence.

Essentially, Judge, what they're doing is the same arguments they're making in the complaint about

plausibility, the same things they're pointing to, the same document, the same words, that's the same stuff they're relying on here and they need more. I thought your point was that their evidence is the same as to both motions, essentially, and it's not good enough in the crime fraud context; isn't that right?

MR. MECKLEY: Yes, that is correct, and it's allegations in one case and mere allegations in the other. And I would just -- I already said it. Allegations aren't sufficient in the crime fraud exception to overcome the attorney-client privilege.

THE COURT: And I'm trying to understand how it would prejudice you were I to decide that I think what I should do is I should first take up the motions to dismiss as they relate to the fraud claim and other aspects of it and then after that deciding that, then pivot back to this subpoena issue and use the knowledge and analysis that I gained through that motion to dismiss resolution process to hopefully pretty quickly dispose of this issue then.

I'm not sure I see how that path would prejudice you. In fact, I would think in some ways it would be the plaintiff who would be telling me not to do that because it may take some time to get to the motions to dismiss. And in the interval, your folks who are being subpoenaed wouldn't have to give up any documents or information. I'm a little

confused as to why it is you wouldn't preference that kind of process. I understand why the plaintiff may not like it, but I thought it would be a process you would say is positive, but seems like you're not, and I'm trying to figure out why.

MR. MECKLEY: I don't want to misstate my position on it. I think, certainly, a sequencing process like you've described is absolutely appropriate, and I don't believe it's -- I mean, my position all along has been the subpoenas are entirely premature, but I think the process you've outlined, where the Court decides the motion to dismiss with respect to the fraud claim first and then we could revisit this issue, my position, Your Honor, is that when revisiting the issue at the appropriate time -- and, obviously, it depends on what your ruling says, of course, but that it isn't a foregone conclusion at that point that if you find there is sufficient allegations within the complaint to overcome the motion to dismiss, our position is just that is not a default to, well, now the crime fraud exception has been proven and, therefore, let's proceed with these subpoenas. That's my position.

THE COURT: Understood. And I understand that part of it, and to that part, I think what it seems like from reading the briefs is there's a dispute here. We know that under the standard, the plaintiffs have to put forward

or make a presentation of "evidence" which, if believed by the fact finder, would be sufficient to support a finding that the elements of the crime fraud exception are met. And it seems like in the briefs the parties are having a fight about what is that can be sufficient to constitute that requires "evidence."

And I think you're suggesting in your briefing that something more than the types of facts or the types of provisions of contractural agreements that the plaintiffs are relying on here, something more than the additional announcements that they're relying on, is needed. They don't have enough evidence. They have merely allegations or something less. And I think the plaintiff is saying no, the things we've pointed to are sufficient to be the kind of evidence that you need to demonstrate the applicability of the crime fraud exception.

And I guess my question is, I'm not sure the parties have provided me with -- when I see those arguments being made, I think to myself there must be cases out there that say something about what exactly is the quantum of evidence needed. Does a party need to rely on declarations or affidavits or, you know, some other type of similar type of evidence to meet that evidence burden? Or do parties win these kinds of cases and show that the crime fraud exception applies by pointing to contractural language or by largely

mirroring allegations in the complaint or whatever? There's cases that would tell me what's enough and what's not enough, what constitutes evidence and what doesn't. I'm not sure I have that stuff in the briefing. I know you were somewhat limited by the page limit, but are there cases that get into that? Are you aware of cases that support your argument here that the evidence the plaintiff cites isn't enough evidence?

MR. MECKLEY: Your Honor, two points on that.

The first is right now I am not specifically aware of cases that identify the quantum of evidence that would be necessary on that point.

But number two, back to your direction regarding sequencing, I think following the Court's resolution of the motion to dismiss, at that point with this particular focus that you have identified, I would suggest the parties would be able to come back with more briefing, perhaps beyond this district, looking at that exact issue, which is what the quantum of evidence and we could actually provide the Court with something more fulsome to make a ruling on.

THE COURT: Okay. The other thing I wanted to just ask about is I'm trying to get a handle on -- and I couldn't get it from the briefing -- what types of and how many documents there are here that might be implicated by the subpoenas. I think one of the things that the

plaintiffs' side asked me is, Judge, if in doubt, do an in-camera review of the documents at issue and make your own determination about whether you think there's sufficient evidence here.

But I don't even know -- what are we talking about? How many documents are at issue? What would be the scope of that kind of review if I had to do it? Have the parties thought or talked about that, Mr. Meckley, and do you have anything you can share with me in that regard?

MR. MECKLEY: Your Honor, I wish I could share more specifics with you about that but, frankly, I am not sure. I know there's five law firms involved. I know that the categories in the subpoenas are extremely broad. They seek all documents and communications, work product drafts, comments, discussions regarding multiple topics. I can't speak to these other firms. I know from my own law firm that that could encompass a huge number of documents and data issues. So unfortunately, I don't think that this would be just a perfunctory, brief, focused review that you could look at and, in camera, make a very easy ruling on that.

THE COURT: Okay. And then I guess the other question I have for you is in your opening brief, the kind of main rejoinder you seem to put forward as to why it is that, in looking at the types of, I'll say, evidence -- you

might disagree that it should be called evidence -- the type of evidence that the plaintiffs have pointed to at issue here, that -- i.e., the evidence relating to the communications in the merger agreement that plaintiffs will be provided with severance benefits that are no less favorable than Twitter's prior severance policy or the subsequent communication that's attached at Exhibit 1 page 24 to the plaintiffs' brief that seemed to underscore that kind of language, and the reality that there was also a third-party beneficiary provision in the agreement, which I think I understand is now being utilized by the defendants to help undercut the argument that the type of severance benefits the plaintiffs are suggesting exists can be claimed.

I think the main rejoinder to the fact that that wasn't -- as to your argument that wasn't sufficient evidence was that one of the statements included the caveat that these were only forward-looking statements that are being made. And the plaintiff came back and said that doesn't apply to our allegations here. The types of claims that are being made about severance benefits don't have anything to do with forward-looking statements talking about potential uncertainties in the future. That's a totally different thing.

Did you have any response to that line of

argument?

MR. MECKLEY: Sure, Your Honor. It goes to the whole caveat about the statements in the FAQs. One, the communication concerning forward-looking statements about risk and certainties is a caveat that this should not be taken as something concrete and certainly not a contractual type of statement that is being made. And that is also, then, married with the language that specifically talks to the severance, which is, well, generally speaking and generally the current severance policy seemed to be this.

But it doesn't change the analysis that if severance was discretionary before and the representation is that you'll get the same things you got before -- again, I'm putting aside the third-party beneficiary piece here, which is a significance piece -- if it was discretionary before, it's discretionary now. And the FAQs cannot be read in a vacuum exclusive of the merger agreement. They refer to the merger agreement 20-plus times, so they are things that have to coexist and, certainly, the FAQs don't trump or overtake what the merger agreement says.

So I hope I've answered your question about the caveat nature of these FAQs.

THE COURT: I guess what I was getting at is in securities cases where I'm looking at forward-looking statements, I specifically think of things like, look, we're

about to make some projections about we think what our financial might be in the future based on data we have now. These are forward-looking statements that can be affected by events that occur hereafter. I think Plaintiffs' point was when you're making comments about what your current severance policy is and how it relates to a prior severance policy, that's not the thing you're usually talk about when you rely on "forward-looking statement" language. That's a statement about present fact and how it relates to a past fact. Is that wrong?

MR. MECKLEY: I'm not going to opine on whether this specific language was intended to only apply to statements related to the securities-type context. I will say, and obviously witnesses can testify to this, I'm not testifying to it, but that it's in the spirit and intent to suggest that these FAQs are merely that. They are statements that are frequently asked questions. They are not amending, changing whatever the merger agreement says. The merger agreement says what it says, and these FAQs are something that might be considered, you know -- I don't want to say supplementary to it because that's not actually correct, but they are just maybe informative. So I think it's in the spirit of the document, which is you should not rely on anything in here.

THE COURT: Okay. And, Mr. Meckley, is there

anything further you wanted to add with regard to arguments about these issues before I turn to your colleague on the other side?

MR. MECKLEY: I did not, Your Honor. I did -- and I appreciate your ruling and I didn't know -- there was one part of that that I did want to -- if you wanted me to make a statement about it that I did want to draw your attention to, but that's only if you wanted to entertain it. This is on the same motion.

THE COURT: Sure. Is it a clarifying point, something you're confused about or a clarifying point you need to make?

MR. MECKLEY: Well, I think the ruling was clear. It was one of the sentences specifically in the ruling that I thought -- I felt I wanted to clarify so at least the Court understood our position.

THE COURT: Sure. If you want to say something for the record that you think just clarifies your position for anyone who's looking at this in the future, go ahead.

MR. MECKLEY: Sure. And this is the sentence in your ruling where you're referring to the unaffected claims, and it states, "The unaffected claims will require substantial discovery regarding the layoffs at the heart of this case, and it appears to the Court that any unique discovery that may be obviated were the motions to dismiss

successful would pale in comparison to that needed as to the resolution of the unaffected claims."

And my position on that is these unaffected claims, even though they're characterized as seven of them are essentially three. One is a Warren claim, one is a Family Medical Leave Act claim, and the third is a "wage theft" claim. And I'm in California. There is no wage theft claim that exists here. So it's really only three claims, and these claims are very distinct from the other claims which I would say are really the primary claims and drivers in this case, so the discovery regarding those three claims that I've identified, Warren, FMLA, and wage theft, will, in fact, pale -- the discovery regarding those claims will pale in comparison to the discovery regarding all of these other seven claims that are the subject of our motion to dismiss which are the primary focus of Plaintiffs' lawsuit, not FMLA, not Warren. Those are very straightforward things.

Just as an example with the Warren act, did you give people notice or not. That's discovery that can be completed in three requests for production and two interrogatories, unlike all this other discovery we're talking about. That was the point. I thought that the Court certainly suggested that that discovery would, you know, dwarf this other, and it's really the reverse.

THE COURT: Okay. All right. Certainly, you made your point in terms of your view on the record. Obviously, the Court has decided the motion and is not going to revisit it. I'd also suggest that in the future if you have briefing in which one of the components of that is a reply brief, if you think points being raised by the plaintiffs are incorrect, you have a place to say it.

And, frankly, we wouldn't be having this call if the motions to quash weren't a part of the issues raised, so I certainly would suggest that if arguments are there to be made, they need to be made crisply in the briefs as well. I'm not sure that what you just said was made crisply in the reply brief. Again, parties are limited in the briefing, but Defendants had space to say what they needed to say.

And I'll also just say for the record it would be an unusual case, maybe not never happens, but it would be an unusual 14-count a complaint in which seven of those counts not challenged in our court and yet the entire case would be stayed. In my experience, it would be an unusual circumstance that the defendants were seeking here.

But as I said, the motion has been decided so we won't have further argument on it. Let me turn to Mr. Cohen on the plaintiffs' side to get his response.

And, Mr. Cohen, maybe we could start with the place I started with the Defendants -- with Defendants'

counsel, Mr. Meckley, which is at some point I've been referred the motions to dismiss here. I'm going to have to make an assessment about whether or not what has been alleged in the complaint suffices to set out a fraud claim. It seems to me that, again, the standards are different -- though, again, both standards are less than an assessment of whether a preponderance of the evidence has been put forward -- that it might well make sense from an efficiency standpoint -- and the Court needs to think about that in light of all we have on the plate -- to tackle the issues around the same time after I've had a chance to assess the motion to dismiss. And it almost seems like here, I'm being asked to preview the decision there on a motion to dismiss, albeit in a slightly different evidentiary framework. If I said to you why wouldn't I take that path here, what would you say in response?

MR. COHEN: Yes, Your Honor. So I certainly understand the attractiveness of that path from the Court's perspective, and I certainly don't want to ask you to do work that is inefficient. There's a couple of reasons why I don't think that's the appropriate path here.

The first thing is that while the analyses are, certainly, closely linked, they aren't identical, and I'm not talking about what you're looking at specifically. What I'm talking about is it is entirely possible -- and

obviously I don't think you should. It's entirely possible that you could say that, sorry, the fraud claim is not sufficiently well pled. I'm dismissing with it with leave to replead. And also that the crime fraud exception has been met, and that's because crime fraud really focuses in on two of the factors in a fraud claim, whereas when you're looking at the adequacy of the complaint, you're looking at all five of the factors for fraud, including did the folks rely on it and was there an intent to -- all of those things come into play in the analysis of a fraud pleading.

And while we believe that when you do that analysis you're going to find that we pled it sufficiently, you might come back so us and say, look, you know, I think you need to allege more clearly this element, see if you can replead. The crime fraud analysis is different and it's different in part because, as we put into our opposition, the crime fraud analysis also applies to attempted fraud. If you attempted to fraud somebody but they didn't actually rely on it and there were no damages, they can't plead a fraud claim because there wasn't any damage. Damage is an element of fraud. But the fact that you made the attempt means those communications are not protected by privilege.

And so the assessment here is really narrowly focused. It's is there evidence of what you told people and is there evidence that that thing that you told people was

knowingly and intentionally false. And here, Your Honor -- and I think if you look at the briefing on the motion to dismiss, that's not what their argument is. Their argument isn't we didn't tell these employees that there were special protections for their severance in their merger agreement. And their argument isn't, yes, there actually were special protections, what we told them was true. And the argument isn't, okay, there aren't special protections but we meant there to be, we're just realizing later that there weren't.

Their argument is we actually never intended to provide any special protections, and, Your Honor, I'd like to address the questions you asked Mr. Meckley first and then I think relatively briefly take a look at what was actually told to the employees, what was actually put in the merger agreement, and then what Twitter and its codefendants have put before this Court that establish that they never meant -- on their representations to the Court, they never meant what they told the employees to be true.

THE COURT: Just to jump in and go back to my original question, which is I think it is the case that to the extent that here we're going to look at certain language, certain documents, certain statements that you are going to point me to to say, look, I think we met our burden as to the prima facie case burden, that those statements, words, documents are the same kinds of statements, words,

documents that you are pointing to and putting forward with regard to your claim as to fraud.

So assessing those, looking at them, figuring out their meaning, what their import is, how a person might have read them and responded to them, I would probably be doing a similar type of analysis, albeit using somewhat different standards, when I assess the motion to dismiss the fraud claim on the one hand and when I assess the crime fraud exception issue on another. Is that fair?

MR. COHEN: Yeah, that is absolutely fair, Your Honor. And, you know, obviously, if your decision is that you're not going look at that until then, that's your -- that's why you're the judge and we're the advocates.

But I think that the analysis here is both sufficiently narrow and also sufficiently distinct from what you will be doing when you're looking at those things on the motion to dismiss that it's worth taking this issue now so that we can start getting this case moving so that we can get -- frankly, this is going to be a big dispute before the Court, so it would be good to get it as resolved as we can, from our standpoint, as early as we can.

THE COURT: I think part of what you were saying earlier, Mr. Cohen, is, theoretically, there is a way that you can grant the motion to dismiss about the fraud claim. If it came down to a different element like a damages

element, that would mean you didn't pass on these, and I think I get that point.

In terms of if I were going to do that -- again, I'm not saying I will. I have to figure out what is most efficient and figure out how it plays into the issues -- it would seem like in terms of prejudice to you, you might be pounding the table more if the case wasn't moving forward otherwise as to discovery and yet you had these subpoenas out there and you thought there was some basis to enforce them. Fair to say that even it meant pausing a decision on this issue until I get to the motion to dismiss and that took some time that the prejudice to you probably is less as compared to a place where a stay has been granted and this case isn't moving forward at all? Is that fair?

MR. COHEN: Certainly, yes. I will say I'm not dispositionally a pound-the-table type of person. I'm not sure you'd see it in the same way.

That said, to the extent Your Honor is inclined to do that and particularly -- this was going to be part of my answer on your question about in-camera review. There are a lot of steps here before we get to production of documents. We need written responses back. We need, essentially, a log of the documents because, assuredly, if Your Honor hasn't ruled on this motion to quash everybody responding is going to be issuing a privilege log. At that

point, we can assess, if Your Honor determined an in-camera review was necessary that we hadn't met the standards, we could assess, number one, how many documents are involved and, number two, if necessary, come up with some sort of sampling mechanism so that instead of it is a large amount -- and I don't know that it is a large amount. Mr. Meckley described these as broad requests.

Yes, they used the words "all documents" but that's not a totem because the requests were actually really narrowly focused. It was documents relating to the specific provisions of the merger agreement at issue, sections 6.9(a) and (e) of the merger agreement and 9.7 which is the other third-party beneficiary clause that they were arguing sort of makes this whole thing meaningless, and the communications with the employees. So it was relatively narrowly focused. It's not going to encompass every document about communications about the merger agreement or anything like that.

But to the extent that it is a large universe, we'll have to pull together a sampling mechanism. What I certainly would ask, Your Honor, is that to the extent that you're saying, look, I'm going to put off deciding the motion to quash until after I've had a chance to review the motion to dismiss, what I wouldn't want is if it takes the Court a month or two months or however long -- and I

understand Your Honor's schedule -- that only then at that point do we start to spin off the mechanism of figuring out what those documents are, privilege log, mechanism for sampling because that process in and of itself could take a couple of months. If the Court is going to pause ruling on the motion to quash then the law firms responding to the subpoenas should produce written responses and objections to the request, run searches, identify how many documents might be responsive, and start the process of automated logging to the point where, you know, you have, okay, look, here's -- just based on what we see in our document review platform, here are the two strums and the subjects of each of these so that we can start to get a sense of which documents we might be asking you to look at.

And frankly, Your Honor, the timing on this merger agreement, it was negotiated in the space of, if I understand correctly, three or four days. It's not a large window, and the timing of the communications with the employees, frankly, any communications between these folks and their lawyers about what they could tell the employees about these special protections would be something that we would want, at the very at least, the Court to review in camera unless it's an extremely large number.

THE COURT: Am I correct here, Mr. Cohen, that the parties are proceeding under the assumption that any

documents or communications implicated by the subpoenas will, in fact, be subject to a claim of attorney-client privilege or attorney work product?

MR. COHEN: I think, Your Honor, that that's not true for any of the e-mails that crossed paths. So if you had people on opposite sides of negotiations e-mailing to each other during negotiations, those are not going to be privileged, but my assumption is that at least a significant portion of the documents are going to be internal to the law firms or client -- to firm representing it. So I don't think all the documents will be privileged, so there should be some production, regardless, but I think there's going to be a larger percentage, obviously, than normal. When you're issuing a subpoena to a law firm, that's going to be privileged, which we wouldn't have done if we didn't have a good-faith belief.

THE COURT: I know you want to make some points about what is the substance of your argument with regard to why you met the hurdle, but I guess my question there is -- or one question I have before that is what I asked Mr. Meckley, which is it does seem like the defendant or the defendant's side is saying we understand what the plaintiffs have pointed to here, the content, the things that they have pointed to, to demonstrate that they have met the prima facie case burden, and we are asserting that that substance,

those documents and/or allegations about certain documents, contractural language, et cetera, just can't serve to meet the quantum of evidence that is required by the caselaw.

And I guess my question to them was, do I have much in the way of cases that tell me what quantum of evidence or maybe what types of evidence are typically found to be sufficient in these crime fraud exception analyses at the prima facie case stage and what aren't? Do I? And do you have any view about whether there's more caselaw out there on that subject?

MR. COHEN: Yes, Your Honor.

So the documents and the cases that I have seen, the cases don't discuss it has to be a particular quantum of evidence because, at the end of the day, it comes down to is there -- sort of a two-part question. Number one, is there anything other than allegations; right? If all you have is somebody saying I think this happened, that's not evidence. On the other hand, once you have documents, testimony from somebody with personal knowledge, anything beyond that, now you've got evidence and then the question becomes is that evidence sufficient that if a trier of fact believed it, it could establish the elements of crime fraud?

And so on the quantum of evidence, it could be one document if that document is strong enough. It could be five documents if those documents interlock in the right

way. So, you know, probably the most famous crime fraud decision in recent memory is the one involving President Trump and John Easterbrook, and there they were looking at memos -- a memo, if I remember correctly, one memo that was written and said that one memo was enough to say we've got a problem. And they looked at e-mails and the Court looked at the communications of the attorney to say this does fit within the crime fraud.

But the cases don't discuss quantum of evidence because it's almost an appellate "was there a sufficient basis in the record for a jury to reach this finding" discussion and that's any quantum of evidence is enough if it shows the elements. And so --

THE COURT: Understood. And why don't I let you make whatever points you want to make about the types of evidence that you pointed to here. I do have another matter after this one, so I want to try to resolve by the top of the hour and give Mr. Meckley a chance to respond by way of rebuttal.

Mr. Cohen, you were going to point me to what do we have? What are the plaintiffs pointing to that is "evidence" that a future fraud was intended?

MR. COHEN: Very quickly, Your Honor, we have the acquisition FAQ. That is a document submitted by the parties. It's in evidence. It is evidence.

Here's what it says, okay. It says, "The merger agreement provides special protection for Tweep compensation and benefits." That's the statement that Twitter made to its employees. There is no question at all that Twitter is now arguing that was not true. Everything single one of its arguments, whether it's you're not third-party beneficiaries; therefore, you can't enforce it. If it's not an enforceable promise, it's not a special protection. The statement now it was entirely discretionary before, it's entirely discretionary now the, merger agreement didn't do anything to your severance. Then it's not a special protection. Every single one of those arguments is an outright statement that the thing that they told the employees was not true and was not intended to be true and with that just two --

THE COURT: Mr. Cohen, is it the case that it's really that special protection language that is the -- if you were saying, look, the thing that they said that we think is indicative and evidence of a fraud is they promised that in the merger agreement there was special protection for benefits, including severance benefits, and that was false --

MR. COHEN: Your Honor, I'm not going to say that's the only thing in here that's problematic, but it is the most glaring and, frankly, irrefutable thing. Because

special protections -- if it means anything at all, special protections means this is not just going to be left up to Elon's discretion after he comes in. Otherwise, that phrase is meaningless.

And the entire argument from Twitter and Mr. Musk and from X Holdings, the parent company here, has been no, there were no special protections. Severance was discretionary before; it's discretionary now. Anything that was in the merger agreement was entirely unenforceable and did nothing at all to protect the severance. Those two statements cannot be squared. They cannot be both true.

Separately, Your Honor, with respect to just two of the arguments they've made on that, number one, there's been an argument that the merger agreement allowed Twitter to change the severance anyway. Number one, that's something that's going to be addressed in the motion to dismiss. We've made our arguments for why that's wrong. But it's also irrelevant here because what the merger agreement required was not that Twitter would pay severance of a particular type but that the parent company would pay severance of a particular type.

And what they told the employees here was that the purchasing entity, which was the parent X Holdings, Corp., would provide the severance. So even if the merger agreement let Twitter change its severance policy -- and

again, you'll see in the motion to dismiss as you do the analysis they didn't -- Twitter told the employees the parent company would have the obligation to pay them the old severance. Discretionary.

If you see the language that's highlighted in a different color, Your Honor, the language wasn't that the severance program will remain the same. The language is that the severance benefits will be no less favorable than those applicable to an applicable employee, those that were categorically available to the employee. And Twitter's prior severance policy had different categories for different employees. They had employees who were level seven and below got three-month severance packages and employees that were level eight and up got six-month severance packages. That's the package that was applicable.

It may well be that in the before times, Twitter could exercise discretion about whether or not it gave any particular employee an applicable -- a package that was applicable to it, but what they told these employees was that after the merger, for a year after the merger, the parent company will provide you the package that was applicable. So and --

Just quickly, this is the various areas of the FAQ where it mentioned that. This is here primarily because, Your Honor, this was not a one-off promise. They

updated that FAQ 12 times, 13 times in total. Twitter said, hey, employees, here is the information you need to know. And every single time they included that language, this merger agreement provides special protections. The acquiring company is going to provide you the severance payment that was applicable to you before, not the one you would have gotten if we were exercising discretion, but the one that was applicable to you.

Again, if this is purely discretionary, it was discretionary before, it's discretionary now, then there is no special protection, and that representation to the employees is false, and that language is in the merger agreement itself.

THE COURT: Mr. Cohen, last question I have. I wanted to let Mr. Meckley have a few brief comments before the top of the hour. My last question I have is I understand your assertion about the special protection wording and why you think that was false or misleading. But to the extent that wording is informed by what is then said below -- what do we mean by special protection? Look below and we tell you -- and when it came to telling about the severance benefits, what was said is that they're no less favorable than those you had before. And I think the argument is from the other side that's what we meant by special protections. That's what we said we meant, and less

favorable means the same, and before we could have done what we did, and now we did what we did. How do you respond to that kind of argument about how -- why "special protection" doesn't have the meaning you think it does.

MR. COHEN: Two things, Your Honor.

Number one, if it was discretionary before, it's discretionary now. That's not a protection because "discretionary" means we can zero it out, we can go to 100, we can do whatever we want. To say, look, I'm specially protecting, Your Honor, your car, what I mean by that is somebody could steal it before, somebody could steal it after, I'm not going to do anything different, I think everybody would recognize semantically that's not what "special protection" means. You can't turn around and say our special protection is discretionary. If they wanted to, there was certainly a way they could have done that, which was to say that it's discretionary.

But the second point is this word that I circled here, "applicable to." It does not say that continuing tweeps whose employment is terminated will get whatever severance they would have gotten under the prior policy. It says they're going to get the severance that was applicable to those employees and that is, again, the same language from the merger agreement. They're going to get what was applicable to those continuing employees.

And what was applicable to those continuing employees is the category that says if you're an employee here, then you are allowed to get this package in general. If you're employee here, if you've got a higher level job, then this package is applicable to you and we'll vary from it on our discretion, but that's what was applicable.

When you tell the employees that for a year they're going to get whatever package was applicable to them, that doesn't mean when you tell me that you're telling the employees you'll get whatever we want to give you. It's this is the package that you're going to get. That does not retain discretion. That actually tosses discretion out the window. The parent must provide whatever was applicable to them.

THE COURT: Okay. All right. We'll have to leave it there, Mr. Cohen. Let me turn back and give Mr. Meckley a few moments --

MR. COHEN: Let me see if I can figure out how to stop sharing. There we go.

THE COURT: You're a better person than I in that regard. Thank you.

Mr. Meckley, I think, Mr. Meckley, hearing all this I think what you're kind of saying is you view the dispute here, which the plaintiff has framed in terms of fraud, as kind of like a difference of opinion about a word

and what a word in a contract means. And I think you're kind of suggesting to me, Judge, that's not what we typically think of, like, evidence of fraud. That's a dispute amongst lawyers about what a word might mean, and there needs to be more than that.

Is that kind of what's going on here in your mind? Or am I misreading what your argument is? I'm not saying it's correct. I'm saying what the gist of your argument is.

MR. MECKLEY: Three points in response, Your Honor. The first point is exactly what you noted.

Mr. Cohen is arguing his interpretation of what words mean, how they relate to one another, how do the FAQs relate to the merger agreement, et cetera. And his arguments are just that. They're arguments. They're not evidence. Evidence is witness testimony under penalty of perjury, interrogatories, responses to requests for production. That's evidence, not argument.

THE COURT: Mr. Meckley, do you know, are there any cases about whether contractural language and its meaning -- I say contractural language here. The FAQs really are what's pointed to. That's not a contract. It's a statement. I guess, are you aware of cases that -- if you're making the suggestion that this is a dispute about the meaning of a word and that's not typically what we think

of as the kind of evidence that implicates the crime fraud exception, are there cases that get to that question that you're aware of?

MR. MECKLEY: It's an excellent point, and I think -- I can't cite them to you right now, Your Honor, but if we go through the sequencing process that I propose that the Court follow, which is decide the motion to dismiss then we can do the briefing -- we can do that briefing at any point the Court wants it to drill down on some of the specific issues that the Court has highlighted today, that's what I would suggest doing. But I agree with you. You characterized my first point correctly, which is this is argument. This isn't evidence, and it's very much one attorney's interpretation of what the language means.

THE COURT: Let me let you continue.

MR. MECKLEY: The second point I wanted to make is Mr. Cohen made the suggestion that not all of these documents would be privileged, that there would be some documents that would not be privileged and those should be produced. And he made an example of communications, e-mails between the firms on the other side of the transaction.

And that is not true. All documents will be privileged. The privilege covers all pre-merger negotiations, and specifically this is -- I would refer the Court to the *Great Hill Equity Partners* case it's 80 A 3d

155 Delaware 2013. Absent an express carveout in the relevant merger agreement, this agreement provides that privileges over all merger communications, including those relating to the negotiation of the merger itself, passed to the surviving corporation in the merger. His exact example, those documents would be privileged based upon this. I want to clarify that.

Third and final point. I think Mr. Cohen suggested that we should have the law firms do all this extremely expensive, time-consuming, burdensome work to sort of go through and prep privilege logs in the hope that at some point down the line the motion to dismiss is overruled and, therefore, now, immediately, we can proceed to that. And I would just suggest that's exact reverse of what we should be doing in terms of efficiency, and these firms should not have do all that work if the motion to dismiss is going to be or would be granted, in which case I believe that if the motion to dismiss is granted, all of this goes away. There is no fraud claim in the case.

That's my last point.

THE COURT: Okay. I thank counsel for their arguments.

What I'm going do is get back to you with some answer on what we're doing with regard to this issue this week in short order, and one way or the other, that may also

include an ask for the parties to submit maybe just an additional letter brief, cabined to just a couple of pages, that may supplement the record in terms of relevant caselaw since we talked about that today and I think at some point both sides have suggested there might well be additional relevant caselaw that could help the Court. At a minimum, I'll do that and let you know how I'm going to proceed with regard to the remaining issue as regards the motion to quash.

Before we end, Mr. Cohen, I saw you raise your hand. Is there anything you want to say procedurally before we end?

MR. COHEN: One thing in terms of the question on caselaw, I would point the Court to the *Montada* case where it analyzed a representation to employees and which words were fraudulent within those representations.

Procedurally, Your Honor, we have set a deadline for the responses to the subpoena of tomorrow for written responses and objections. I just wanted to make sure the Court was aware of that. If you want that to be stayed pending something further, you should let us know. I think, certainly, written responses and objections are not particularly burdensome, and so depending on what the Court's sense of timing is, you should let us know how you want to handle that, whether it's written responses,

objections, or further productions.

THE COURT: Mr. Meckley, is there anything you want to say about whether -- Mr. Cohen is talking about written responses to regarding objections could be provided even if the process of searching for and assessing responsive documents in light of them would not be.

MR. MECKLEY: My belief, based upon the FRCP and just sort of common practical sense, would be the motion to quash should stay any response unless and until the motion to quash is resolved. So there should be no response while that is pending.

THE COURT: Okay. That may be something I'll ask the parties to at least -- to meet-and-confer about briefly hereafter, but let me -- as I said, I'll get you a short order that would tell you procedurally how I'm going to try to handle this issue and look for some additional language from the Court about what I might be asking the parties to do. Okay.

But thank you, counsel, for your time. I appreciate it, and I'll look forward to being in touch with you in the future. Take care. We'll go off the record. Thank you.

C E R T I F I C A T E

I, Deanna L. Warner, a Registered Professional Reporter, do hereby certify that as such Registered Professional Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings.

Deanna L. Warner, RPR, CSR
Official Court Reporter
U.S. District Court

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